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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

Nos. 281-282

IN THE MATTER OF

GRANADA APARTMENTS, INC.,

DEBTOR.

WEIGHTSTILL WOODS, COURT TRUSTEE,

Petitioner,

vs.

CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO, AND OTHERS,

Respondents.

MOTION FOR A RULE UPON RESPONDENT ATTORNEYS TO SHOW CAUSE WHY THEY FAIL TO REPAY AND REFUND TO GRANADA ESTATE, IN ACCORDANCE WITH THE OPINION OF THIS COURT, $5,500 IN FEES MISTAKENLY PAID TO AND IMPROPERLY RECEIVED BY THEM.

WEIGHTSTILL WOODS,
Attorney for Court Trustee,
77 West Washington St.,
Chicago, Illinois.

JAMES GLENN MCCONAUGHY,
On the Brief.

THE BUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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To the Honorable, the Justices of the Supreme Court of the United States:

Petitioner respectfully makes motion that Your Honors

enter a rule upon respondent attorneys, and upon their firm Defrees, Buckingham, Jones and Hoffman, as officers of this court and as parties to this case, to show cause why they should not, in accordance with the rule affirmed by Your Honors' opinion in the case at bar, repay and refund to Granada Estate and to the Court Trustee, certain moneys collected by them as legal fees from Granada Estate in the sum of $5,500 together with interest at six per cent, pursuant to the suggestions which follow.

Respectfully submitted,

WEIGHTSTILL WOODS,
As Court Trustee.

SUGGESTIONS IN SUPPORT OF MOTION.

On February 3, 1941. Your Honors filed the opinion of the court in cases 281 and 282. This dealt with fiduciary duties and the denial to fiduciaries of fees when they act in breach of trust. In this opinion Your Honors determined (1) that mortgage trustees, bondholders committees and lawyers are fiduciaries, and (2) that when such fiduciaries serve conflicting interests, they disentitle themselves to fees.

Upon application of this rule against serving more than one master, recovery of a requested fee *balance* of some $24,500 was denied by the District Court to respondent attorneys and their law firm, Defrees, Buckingham, Jones and Hoffman. The denial was confirmed by Your Honors on February 3, 1941. As above suggested this claim for $24,500 was *a balance* which counsel for the bondholders' committee and the mortgage trustee were asking as legal fees. From the printed record as prepared by respondents, and filed in this court, it appears that this sum was a balance on an estimated $30,000 fee and that some $5,500 had already been paid to and pocketed by respondent law firm.[1] The nature of the fees so paid is stated at Appendix "B" of these suggestions.

In view of Your Honors' opinion of February 3, 1941, your petitioner as Court Trustee, believes it is his duty[2]

1. At PR. 495-496 it appears that a member of respondent law firm testified:

"In my opinion reasonable compensation for all our services would be not less than a total of $30,000, *with credit for the payments of* $5,500 *heretofore made us*, and so we request a present net allowance to us of $24,500. There are no requests for disbursements."

2. In the case of *Pueblo Savings & Trust Co.* v. *Power* (C. C. A. 7, 1940), 115 Fed. (2d) 69 at 72, the court observed that:

"A trustee in bankruptcy stands in a different relation to the court from that of a mere creditor. He is an officer of the court, as well as the owner of an interest. It is his duty to collect the assets and he is responsible for failure so to do."

to call this matter to the attention of Your Honors, to the end that respondent attorneys make restitution of said $5,500 to this petitioner as Court Trustee, for the benefit of the Granada Estate. In performance of petitioner's duty a demand was served upon respondent attorneys on February 24, 1941. This notice is set forth as Appendix "A" to these suggestions. Since respondent attorneys have had the opportunity voluntarily to comply with the ethical requirement of the situation at bar, petitioner respectfully presents this motion and said prior notice, and asks that a rule be entered upon respondent attorneys to show cause why they should not refund and repay such moneys. In response to such rule of this court, if entered, respondent attorneys (who are now before Your Honors on their general appearances) may repay these funds,[3] or show cause, if any, why they should be excused.

Respectfully submitted,

WEIGHTSTILL WOODS,
Attorney for Court Trustee.

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3. Petitioner believes that the respondent attorneys will wish to demean themselves "uprightly, and according to law" within the meaning and intendments of Your Honors' opinion in the case of *In Re Gilbert*, 276 U. S. 6 (1928) and should voluntarily repay such improperly received fees. In that case Your Honors stated that the respondent was an officer of the court and as such (Pp. 9-10):

> "He could not rightfully accept or retain anything as compensation unless sanctioned by proper order of court. Reception then or now of a gratuity from any party would be indefensible, and whether or not the corporations which paid him by direction of the court are satisfied with the result is now unimportant. He has long been an attorney and counsellor authorized to practice at this bar under the sanction of an oath to demean himself 'uprightly, and according to law' * * * He knew that he had got unearned money by improper orders of court, but he decided to keep it. Such conduct is far from 'upright and according to law' within the fair intendment of those terms."

APPENDIX "A".

DEMAND SERVED ON DEFREES, BUCKINGHAM, JONES & HOFFMAN.

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1940.

Nos. 281-282.

281.
WEIGHTSTILL WOODS, Court Trustee, *Petitioner*,
vs.
CITY NATIONAL BANK AND TRUST CO. OF CHICAGO, and others,

282.
WEIGHTSTILL WOODS, Court Trustee, *Petitioner*,
vs.
CITY NATIONAL BANK AND TRUST CO. OF CHICAGO, and others,

} On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

NOTICE.

To: Defrees, Buckingham, Jones & Hoffman, and each and all members of said law firm,
105 South La Salle Street, Chicago, Illinois.

YOU ARE REQUESTED, as respondents and attorneys of record in these matters, to pay to the Court Trustee the sum of $2000, which you received on August 24, 1933 from Granada bondholders treasury; and the sum of $3500, which you received April 13, 1935, from Granada bond-

holders treasury, together with interest at six (6%) percent on said sums, to be accrued from the time you received said monies as for legal fees, until repayment shall be made.

Your duty to repay these monies to Granada treasury, appears from your admission at various places in the record that you received the monies as for legal fees (PR. 479, 484, 496 are examples); and from the ruling made by the District Court on May 2, 1939, which was confirmed by the Supreme Court on February 3, 1941, that you were acting in conflicting capacities and therefore were not entitled to receive fees from Granada treasury.

Your duty further appears from Canons of Professional Ethics of the Chicago Bar Association, the Illinois State Bar Association, and the American Bar Association (see page 69, Petition for Writs of Certiorari); and also appears from these cases: *Strong* v. *International Building, Loan & Investment Union,* 183 Ill. 97 at 100, 55 N. E. 675; *People* v. *Gerold,* 265 Ill. 448 at 477, 107 N. E. 165 at 177; *Re Gilbert,* 276 U. S. 294 at 296, and 276 U. S. 6 at 9-10.

PLEASE be advised that unless said monies are repaid in full to the Court Trustee, before March 1, 1941, this notice and an appropriate motion will be presented to the Supreme Court for its consideration.

Respectfully submitted,

WEIGHTSTILL WOODS,
as Court Trustee.

RECEIVED copy of foregoing notice February 24, 1941.
DEFREES, BUCKINGHAM, JONES & HOFFMAN,
By: VINCENT O'BRIEN (Signed),
A Member of said Law Firm.

APPENDIX "B".

The Two Fees Received by Defrees, Buckingham, Jones & Hoffman.

I. *The $2,000 fee.*

From the testimony of respondent counsel at PR. 479 and 477-478, it appears that this fee was received in August of 1933, in relation to the furniture or "fixture" litigation. This was at the conclusion of this particular litigation. Cody Trust Company went into receivership four months later (Pr. 479). In July of 1933, one month before this fee was received, respondent lawyers filed a bill to foreclose, "a public default having been made in the payment of both principal and interest due under the first mortgage." (PR. 480.) Thus it appears that the $2,000 was needed for payments to the bondholders. Your Honors' opinion states that (61 S. Ct. 496):

> "And respondent counsel had acted as general counsel for one of the two principal underwriters (Chicago Trust Company, which was also the original indenture trustee) during the financing of the property here involved; and that underwriter's prospectus was under attack in these proceedings."

The furniture litigation was wholly caused by the false prospectus of respondents' clients. The litigation kept the Chicago Trust Company from declared insolvency until 1934. Relating to this matter the District Court found that:

> "Services of said attorneys were performed to protect persons other than bondholders." (PR. 777.) (Finding 24.)
>
> "Respondents and the other signers, by stipulations assisted in this breach of trust, knowing that there would not remain money to pay the bondholders." (PR. 779.) (Finding 28.)

Also see testimony of Vincent O'Brien at PR. 499 ff.

Petitioner submits that this $2,000 fee should never have been paid or received in the first place, and that respondents were serving conflicting interests at the time payment was made.

II. *The $3,500 fee.*

A similar situation exists as to the $3,500, paid in April 9, 1935 for the case of Tuttle *vs.* Harris, which was brought to this court. That litigation was against the old Granada Hotel Corporation which had been dissolved in 1930, and did not exist.[4] The debtor estate, Granada Apartments, Inc., was not a party to that litigation. Under the guidance of respondent counsel, the committee intervened in that case, but never informed any court that the debtor estate was not a party to that suit. When the litigation was over, respondent attorneys again accepted money from the Granada Estate which was needed to pay first mortgage bond interest, for services not rendered for Granada Estate nor for any benefit to its bondholders. The District Court so found at finding 46, PR. 786.

While moral turpitude may aggravate a situation, yet, the Granada opinion by your Honors accurately states the basic rule thus:

> "Where an actual conflict of interest exists, no more need be shown in this type of case to support a denial of compensation."

4. Respondent firm itself handled this transaction in 1929 whereby the new corporation was created and all assets were transferred to it from the old Granada Company. At PR. 496-497 counsel said:

"I think it is substantially so that in 1929 we did handle the set up of the Granada Apartments, Inc., and the transfer from the old corporation. The legal work was handled in our office." Also PR. 502.

THE LAW OF ILLINOIS SINCE 1899.

Respondent counsel should not and cannot claim that Your Honors' opinion announces a new policy or changes the law in regard to the right to fees, for attorneys who have served conflicting interests. So far as attorneys are concerned, the rule announced by Your Honors' opinion is the same that was announced by the Supreme Court of Illinois over forty years ago in the case of *Strong* v. *International Building, Loan & Investment Union,* 182 Ill. 97, 55 N. E. 675 (1899), where the court ruled that an attorney, employed by an association to free it from receivers and who also accepted employment from one of the receivers who had an interest adverse to the association, could not recover for his services to the association, even though the association waived its objection to the conflicting representation. Speaking of the reason for the rule the court said:

> "Nor does it matter that the intention and motives of the lawyers are honest, as we fully believe them to have been in the present instance. The rule is a rigid one, and designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent."

Respectfully submitted,

WEIGHTSTILL WOODS,
Attorney for Court Trustee,
77 West Washington St.,
Chicago, Illinois.